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Nos. 07-984 & 07-990

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IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,
Petitioner,
v.
SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,
Respondents.

STATE OF ALASKA,
Petitioner,
v.
SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER STATE OF ALASKA

INTRODUCTION

The validity of the petitioners' and the federal agencies' position is demonstrated by statements in respondents' own brief. The plaintiff-respondents

("SEACC") concede that the proposed discharge at the Kensington mine meets the applicable definition of fill material, and that Section 404 authorizes the Corps to permit discharges of fill material subject only to the guidelines specific to that section. *See* SEACC Br. 20, 7. That should be the end of the analysis, since SEACC also concedes that "Congress did not authorize the Corps to issue section 404 permits incorporating effluent limitations under sections 306 or 301"—in other words, that effluent limitations are not applicable to Section 404 permitting decisions. *Id.* at 37. Because there is no dispute that the proposed discharge constitutes fill material under the plain language of the governing regulations, and that the Corps has fully complied with every provision of Section 404, the permit is valid and should be upheld.

But even if there were statutory ambiguity, SEACC neither challenges the reasonableness of the agencies' asserted position nor overcomes the near-absolute deference they are owed in interpreting their own regulations. The agencies reasonably concluded that all fill material should be treated alike, subject to the stringent environmental controls of Section 404. SEACC, by contrast, would require Coeur to destroy a far greater area of U.S. waters in order to erect a massive stack of tailings along the Alaskan coastline. The expert agencies charged with evaluating the issue—the Corps and the State—have determined after extensive analysis that that alternative would be more damaging than the approved plan. There is no basis for this Court to countermand that reasoned determination.

I. THE CWA UNAMBIGUOUSLY AUTHORIZES THE CORPS TO PERMIT THIS DISCHARGE.

A. Effluent Limitations Are Not Applicable To The Permitting Of Fill Discharges.

The central issue in this case is which CWA permitting scheme governs the proposed discharge: Section 404 or Section 402. The parties agree that only one of the two schemes can be applicable. *See* SEACC Br. 7 (if a "discharge is authorized by a valid fill-material permit under section 404, a section 402 permit is not required"). SEACC concedes that the discharge at issue meets the regulatory definition of fill material. *See id.* at 20 (discharge "meets the agencies' new definition of 'fill material'").[1] SEACC further recognizes that Section 404 authorizes the Corps to issue permits for the discharge of fill material subject "to guidelines developed in conjunction with EPA"—*i.e.*, the Section 404(b)(1) Guidelines. *Id.* at 7. And SEACC does not dispute that the discharge at issue meets those Guidelines, which are the only standards imposed by the CWA for issuance of a Section 404 permit. From this, the validity of the Corps' permit should follow ineluctably. The discharge is concededly "fill material"; it complies fully with the Guidelines and all other criteria of Section 404; and EPA did not veto the Corps' permit.

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[1] Some of SEACC's amici question the legal validity of that definition. *See* Mehan Amicus Br. 17-18; Members of Congress Br. 17-18. But SEACC did not raise that argument in the Ninth Circuit or in this Court, and the argument is thus not properly before the Court. *See, e.g., Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992).

SEACC, however, argues that another CWA provision—Section 306(e)—creates an exception to the Corps' authority to issue Section 404 permits for fill material.[2] SEACC places virtually all its eggs in this basket, but the basket cannot bear the weight. Section 306(e) states that a discharge cannot be "in violation of" an "applicable" performance standard. 33 U.S.C. § 1316(e); *see* Alaska Br. 33-34. Looking to its governing statutory mandate—Section 404—the Corps correctly determined that the performance standard now invoked by SEACC is not applicable to the agency's permitting of this proposed discharge of fill material. Far from undermining that determination, SEACC now expressly concedes that "Congress did not authorize the Corps to issue section 404 permits incorporating effluent limitations under sections 306 or 301." SEACC Br. 37. In other words, under SEACC's *own* interpretation, Section 306 performance standards are *not* applicable to discharges of fill material permitted by the Corps under Section 404. Fill permits are governed instead by the separate Section 404(b)(1) Guidelines. *Id.* at 7. Because this discharge is fill material not governed by effluent limitations, it will not be "in violation" of any "applicable" performance standard.

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[2] SEACC does not even attempt to defend a key ground for the Ninth Circuit's decision and instead mischaracterizes it to avoid admitting to that concession. SEACC Br. 38. Whereas the Ninth Circuit made Section 301(a) and its use of the word "and" a centerpiece of its interpretation, *see* JA527-28a, 531a, SEACC now concedes that "[n]one of this [analysis] resolves the question in this case" because Section 301(a) merely provides that discharges are subject to "applicable" provisions of the CWA and "does not * * * answer whether a particular [CWA] section applies to a particular source or discharge." SEACC Br. 39. Section 301(a) therefore does not preclude The Corps' permit.

It is not surprising that SEACC concedes that performance standards are not applicable to Section 404 permitting, since the plain language of the CWA mandates that interpretation. *See* Alaska Br. 24-30. As SEACC recognizes, whereas Section 402 expressly requires that EPA permits must comply with effluent limitations, "section 404 makes no provision for the Corps to incorporate applicable section 306 performance standards in its permits." SEACC Br. 21. Thus, the very effluent limitation relied on by SEACC was made applicable only to the Section 402 permitting scheme. *See* 47 Fed. Reg. 54,598, 54,606 (1982) (effl ıent limitations promulgated in that regulation "will be applied to individual ore mines and mills through NPDES permits issued by EPA or approved state agencies, under Section 402"). Because Section 404 discharges must comply only with the mandates of that section, Coeur's fill material permit was not required to incorporate EPA performance standards.

Moreover, Congress has shown that it knows how to apply effluent limitations to both fill material and to other discharges otherwise exempt from Section 402, but it never directed the Corps to apply the performance standard invoked by SEACC here. Congress directed the Corps to apply Section 307 effluent limitations for toxic substances—but not other effluent limitations—under Section 404. *See* Alaska Br. 29. Under SEACC's interpretation, this was an unnecessary and redundant act, since Section 307(d) contains the same sort of prohibitory language as Section 306(e). *See* 33 U.S.C. § 1317(d).

Congress also amended the aquaculture permitting authority of Section 318—which, like Section 404, is expressly excepted from Section 402—to require

application of effluent limitations, but made no similar amendment to Section 404. *See* Alaska Br. 28. SEACC's response that the disparate amendment of Section 318 "reinforces" its position, SEACC Br. 38 n.11, has no basis. Before the amendment, discharges associated with approved aquaculture projects—like discharges of fill material today—did not need to comply with effluent limitations. Discharges of fill material remain subject only to the criteria of Section 404.

In short, the CWA nowhere requires the Corps to reject a Section 404 application for a discharge of fill material based on whether it meets effluent limitations promulgated by EPA under Section 306. As a result, SEACC is reduced to arguing that the mere existence of EPA-promulgated effluent limitations creates an unwritten exception to Section 404 that forbids the Corps from permitting a discharge of what is concededly fill material, and instead gives that responsibility to EPA. *See* SEACC Br. 21 (Because Section 404 does not allow the Corps to incorporate performance standards, "discharges from sources subject to performance standards must be permitted, if at all, under section 402"). Thus, it is SEACC, not the State, that is impermissibly attempting to imply an exception that Congress did not provide. *Cf.* SEACC Br. 29-32.

In any event, Section 402 refutes that argument. Whereas Section 404 does not have any exceptions to its permitting authority, Section 402 does. Under Section 404, the Corps may permit *all* discharges of fill material, provided the Section 404(b)(1) Guidelines are met and EPA does not veto. Nor does the word "may" in Section 404 undercut the Corps' authority. *Cf.* SEACC Br. 27. The Corps is not

required to issue every permit for fill material, but it is plainly given the *authority* to do so whenever the requirements of Section 404 are met.[3] By contrast, EPA has no authority under Section 402 when fill material is involved, because that authority applies only "[e]xcept as provided in * * * [Section 404]." 33 U.S.C. § 1342.[4]

Given the parties' agreement that the Corps is prohibited from incorporating EPA performance standards into its Section 404 permitting decisions, it is hard to understand how the Corps could even determine that a proposed discharge of fill is subject to SEACC's unwritten exception, since that determination would depend on EPA's interpretation of its performance standards. The agencies, by contrast, hewed to Congress' comparatively bright line: if a discharge involves dredged or fill material, it is permitted by the Corps under Section 404, applying the criteria set forth in that section; if not, it is permitted by EPA under Section 402.

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[3] Similarly, it is immaterial that Corps regulations refer to other statutes that may apply. *Id.* Those statutes may require additional permits in some instances, but nothing in the CWA—the only statute at issue here—divests the Corps of its authority to permit this discharge under the CWA.

[4] SEACC concedes that this language exempts discharges subject to Section 404 from the Section 402 permitting scheme, but nonetheless argues that Congress would have included a similar exception in Section 306(e) if it had intended to allow the Corps to grant the permit at issue. SEACC Br. 33. Given SEACC's agreement that Section 306 effluent limitations are part of the Section 402 scheme but not the Section 404 scheme, that claim unravels. There was simply no need for Congress to write an exception into every provision relating to the Section 402 permitting scheme when it already did so in Section 402 itself.

Regardless, even under SEACC's own theory, it is EPA's regulations, and not the CWA itself, that determines when Section 306(e) prohibits a discharge. The statute would not answer the question because the permissibility of a discharge would turn on the nature of EPA's performance standards. In other words, under SEACC's theory EPA determines when a discharge is in "violation" of an "applicable" performance standard. But here, EPA has determined, both as a general matter and as applied to this mine, that the performance standard invoked by SEACC is *not* applicable to this proposed discharge, and that the proposed discharge will not violate it.[5] As shown below, SEACC cannot overcome the broad deference owed EPA in the interpretation of its own regulations. Therefore, even if the statute itself did not render the performance standard inapplicable to this case, EPA's own regulations and decisions have. *See* Alaska Br. 34.

Finally, there is no merit to SEACC's assertion that Section 306(e) has an "independent" effect that voids the Corps' permit in this case. *See* SEACC Br. 33-36. Section 306(e) might conceivably be invoked in an enforcement action where a discharge subject to an applicable performance standard has received *no* permit at all. But this case challenges a permit for the discharge of fill material issued by the Corps under Section 404, and the parties agree that the Corps has no authority to incorporate Section 306 performance standards into that permitting decision.

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[5] *See* 40 C.F.R. § 122.3(b) (exempting discharges of fill from NPDES permitting requirements); JA144a-145a (EPA determination that "effluent limitations guidelines and standards, such as those applicable to gold ore mining * * * do not apply to the placement of the tailings into the proposed impoundment").

Thus, there is no basis to void the Corps' action pursuant to the purported "independent" effect of a provision that the Corps is concededly not authorized to apply. SEACC's reliance on Section 404(n), 33 U.S.C. § 1344(n), is similarly misplaced. *See* SEACC Br. 27-28. That section merely preserves EPA's ability to institute enforcement actions under Section 309, 33 U.S.C. § 1319, where such actions would be appropriate; it says nothing about whether effluent limitations apply to fill material.[6]

The CWA is unambiguous that the Corps may issue a permit for the discharge of fill material that complies with the Section 404(b)(1) Guidelines and is not vetoed by EPA. Since the discharge at issue concededly meets all these criteria, the permit was proper and the Ninth Circuit's decision should be reversed.

B. The Legislative History Confirms The Agencies' Interpretation.

Alaska explained in its opening brief that SEACC's position vitiates Congress' key compromise in enacting Section 404. *See* Alaska Br. 38-40. Under that conference committee compromise, the Corps retains the authority to permit all discharges of dredged and fill material, subject to EPA environ-

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[6] Moreover, under Section 404(p), compliance with a Section 404 permit is "deemed" compliance with all of Section 301 for purposes of enforcement, and Section 301(a) in turn incorporates a requirement to comply with Section 306 to the extent applicable. That is yet another reason why the Corps' permit is valid. *See* Alaska Br. 34. Although SEACC notes that Section 404(p) does not refer to Section 306, that is not surprising given that all parties agree that Section 404 permits need not comply with Section 306 performance standards. *See* Fed. Resp. Br. 22 n.5.

mental oversight in the form of the Section 404(b)(1) Guidelines and EPA's veto right. Congress explicitly rejected a version of the statute initially proposed by the House—and urged by SEACC here—under which discharges of dredged and fill material would be subject to EPA effluent limitations. SEACC does not respond to—and thus effectively concedes—this understanding of the actual legislative history.

Instead, SEACC attempts to draw contrary inferences from the minutiae of a pre-CWA dispute involving a single mining company. *See* SEACC Br. 42-43 (discussing *Reserve Mining Co.* v. *EPA*, 514 F.2d 492 (8th Cir. 1975)). That case, however, did not implicate the CWA. *See Reserve Mining*, 514 F.2d at 526 n.65 (CWA is "not applicable to this litigation"). SEACC notes that, prior to the CWA, that company had elected to apply for tailings discharge permits under both the Rivers and Harbors Act ("RHA") and the Refuse Act, and that the CWA transferred the latter application to the EPA. *See* SEACC Br. 42-43; *cf.* Alaska Br. 37 (discussing pre-CWA statutory scheme). But the Refuse Act application was not even acted upon. *See Reserve Mining*, 514 F.2d at 531. And there is no indication anywhere in the legislative history that this single company's permit application decisions were to inform the content of the CWA.

Rather, as Alaska has noted, the *Reserve Mining* case shows the shortcomings in the Corps' previous permitting authority, which focused on navigational rather than environmental concerns. *See id.*; Alaska Br. 37-38. Thus, for example, there is no indication that the RHA permit issued to the Reserve Mining company involved secure impoundments, mitigation measures, or any EPA environmental review—all of

which are mandated by the Section 404 permit at issue here. *See Reserve Mining*, 514 F.2d at 500. Nor is there any indication that the discharges would have qualified as "fill material" under the new CWA—pursuant to any definition of that term—since they were unlikely to have raised the elevation of Lake Superior. Congress' solution to the shortcomings in the Corps' authority was to retain the Corps' pre-existing ability to permit discharges of tailings that qualify as fill material, but to require EPA environmental oversight *within* the Section 404 process, through application of the Section 404(b)(1) Guidelines, effluent limitations for toxic substances, and EPA's absolute veto right. The permit at issue faithfully carries out that mandate.

II. THE AGENCIES REASONABLY RESOLVED ANY AMBIGUITY.

Alaska has shown that even if the statute were ambiguous, the federal agencies' resolution of any ambiguity would be entitled to dispositive deference under *Chevron*. *See* Alaska Br. 41-49. This issue is now easy to resolve, since SEACC nowhere challenges the reasonableness of the agencies' determination that EPA effluent limitations do not apply to discharges of fill material permitted by the Corps (in the event the statute itself does not dictate the answer). Instead, SEACC contends (wrongly, as shown below) that the agencies cannot even construe their own regulations as endorsing that proposition. Thus, in the event that the Court defers, as it should, to the agencies' interpretation of their own regulations, there is no dispute that that interpretation passes muster under the second step of the *Chevron* analysis.

Rather than contest this issue directly, SEACC and its amici attempt to impugn the agencies' judgment indirectly, by positing a parade of environmental horribles that will allegedly befall this project and others in the future if all fill material remains subject to the Corps' authority. There is no basis for these dire predictions. As the agencies determined, there are sound reasons for subjecting all fill material to a distinct regulatory scheme tailored to the environmental issues posed by such discharges. *See* Alaska Br. 44-49; *Rapanos* v. *United States*, 547 U.S. 715, 744-45 (2006) (plurality).[7] Moreover, the Corps and the State—which have responsibility for ensuring the environmental soundness of this project—painstakingly examined this proposed project and reasonably determined that the lake fill option is more environmentally protective than permanently destroying a far larger area of wetlands in order to construct a large open-air tailings pile.

SEACC misleadingly asserts that the tailings fill would be toxic to aquatic life due to its elevated pH level. SEACC Br. 4. As SEACC's own record citations make clear, any elevated levels "are expected to occur only in the immediate vicinity of the tailings pipe outfall" and "will dissipate very rapidly." JA206a, 360a. *See* Alaska Br. 14. Moreover, as SEACC admits, there will be only "trace" concentrations of metals in the tailings, SEACC Br. 4, and their toxicity will be no different

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[7] SEACC does not even cite *Rapanos*, much less distinguish its statements regarding the differences between the regulation of discharges of fill material and discharges of mobile waterborne pollutants.

than that of the lake's natural sediment, JA156a.[8] Thus, the expected loss of aquatic life—which is to be fully restored—would primarily occur from organisms being covered with the discharged material rather than from toxicity. JA483a. But this is no reason to treat this discharge any differently from other discharges of fill material. *All* fill material, by definition, will cover whatever organisms may be on or near the bottom.

Notably absent from SEACC's brief is any defense of the alternative that would likely occur if Coeur's permit is invalidated: the permanent destruction of an area of wetlands five times the size of Lower Slate Lake in order to facilitate an unsightly tailings stack above Lynn Canal. As the Corps and the State reasonably concluded—and SEACC does not dispute here—this option would be more environmentally harmful than the approved plan.

This fact also points out the logical fallacies in SEACC's interpretation. Its reasoning would absolutely prohibit the proposed tailings discharge, but would still allow the Corps to permit Coeur to fill the lake, or another waterbody, with material of the same composition as the tailings, as long as it does not come from a mine or some other source covered by an effluent limitation. And Coeur could then dump its tailings on top of what would then be dry land, free from any further CWA oversight under either permit program. Rather than adopt this bizarre regime, the agencies reasonably concluded that all fill material should be subjected to the same rigorous permitting requirements under Section 404.

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[8] Although SEACC misleadingly implies otherwise (SEACC Br. 3), no cyanide will be used in this mine, SER853.

Given those requirements, there is no basis for SEACC's implication that the Corps would now begin to permit fill discharges of such things as manure, battery manufacturing waste, or asbestos. SEACC Br. 45, 51. There is no indication that the Corps ever has done or ever would do so. Section 404 permitting is a rigorous process. The Corps examines myriad factors including toxicity and water quality; it forbids any discharge if there is a practicable and less harmful alternative; and it requires extensive mitigation efforts. *See* NAHB Amicus Br. 17-27. The Corps also conducts an expansive public interest inquiry, evaluating a vast array of concerns including aesthetics, wildlife values, recreation, water supply and conservation, and "in general, the needs and welfare of the people." 33 C.F.R. § 320.4(a)(1). States such as Alaska may also impose their own restrictions. *See* 33 U.S.C. § 1341(a)(1). And even if a discharge satisfies the Corps' rigorous process based on EPA's own Section 404(b)(1) Guidelines, EPA may still veto any permit based on its own determination that the discharge will have an "unacceptable adverse effect" on water supplies, fisheries, or recreational areas. 33 U.S.C. § 1344(c).

The solid material that Coeur proposes to discharge is ground up earth and rock, not toxic sludge. The governing regulations expressly allow this discharge to be permitted as fill material because while tailings may be in a "slightly different physical form from the traditional rock and soil used as fill material," they nonetheless "can have the same effect on the aquatic environment as those materials." JA93a. To the extent there is any ambiguity in the statute, there is no dispute that the agencies reasonably resolved it by treating all fill material under the same statutory and regulatory framework.

III. THE AGENCIES' INTERPRETATION OF THEIR OWN REGULATIONS IS NOT CLEARLY ERRONEOUS.

Although it does not dispute that the position espoused by the agencies in their regulations is entitled to *Chevron* deference, SEACC Br. 43, SEACC nevertheless disputes the agencies' view as to what their regulations actually say. But SEACC ignores the daunting legal standard that stands in the way of that argument. Although it concedes that "[a]n authoritative expression of an agency's interpretation of its rule is entitled to deference as to the rule's meaning," SEACC Br. 58, SEACC fails to apply that standard to the central issue in this case.

SEACC cites a hodgepodge of agency statements and actions over a 30-year period as if it were this Court's role to determine in the first instance what the Corps and EPA intended in their own regulations. It is not. The agencies have definitively stated, in formal pronouncements rendered after notice-and-comment, that "EPA has *never* sought to regulate fill material under effluent guidelines" and that "*any* mining-related material that has the effect of fill when discharged will be regulated as 'fill material.'" 67 Fed. Reg. 31,129, 31,135 (2002) (emphases added). The agencies have likewise espoused that view in their brief to this Court, which independently warrants deference. *See Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) ("Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of

deference.").[9] Thus, in determining the meaning of the agencies' regulations, this Court's task is an easy one: this interpretation by the agencies of their own regulations is "controlling" unless "plainly erroneous or inconsistent with the regulation[s]." *Id.* at 461. As discussed below, SEACC does not even come close to overcoming that controlling deference.

1. SEACC fails to show how the agencies' interpretation of their own regulations conflicts with the plain language of the regulations themselves. To the contrary, the regulations provide that discharges of fill material include the "placement of * * * tailings," 33 C.F.R. § 323.2(f); that a Section 404 permit may be granted for such discharges without compliance with the effluent limitation relied on by SEACC, *see* 40 C.F.R. Part 230; and that no EPA permit is required for "discharges of dredged or fill material into waters of the United States which are regulated under section 404 of [the] CWA." 40 C.F.R. § 122.3(b). And SEACC expressly concedes that the discharge at issue "meets the agencies' new definition of fill material." SEACC Br. 20. SEACC's inferences based on snippets from preambles and unpublished responses to comments—while mistaken—are ultimately immaterial, since those statements cannot override or displace the regulations themselves. *See* Alaska Br. 50-51; Fed. Br. 34.

Also unavailing is SEACC's attempt to play grammarian with the lack of a comma before the word "which" in EPA's longstanding regulation exempting discharges of fill material from NPDES

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[9] Although EPA is not a formal party to this case, its counsel has joined the Federal respondents' brief, and Alaska understands that that brief represents the considered views of both the Corps and EPA.

permitting. *See* SEACC Br. 48. There is an "inherent ambiguity" in this usage because "the lack of a comma suggests that the modifying clause is restrictive" whereas "the word 'which' suggests that the clause is nonrestrictive." *Rhodes* v. *County of Darlington*, 833 F. Supp. 1163, 1190 n.18 (D.S.C. 1992).[10] Thus, the regulation is, at a bare minimum, ambiguous, meaning that EPA—not SEACC—is the final arbiter of its meaning. And EPA stated unequivocally in 2002, long after the comma went missing, that the agency had "never sought to regulate fill material under effluent guidelines." 67 Fed. Reg. at 31,135. The agency had similarly concluded in 1986 that "discharges listed in the Corps' definition of 'discharge of fill material' * * * remain subject to section 404 even if they occur in association with discharges of wastes meeting the criteria * * * for section 402 discharges." 51 Fed. Reg. 8,871 (1986).[11]

Because these interpretations are consistent with the regulation and not clearly erroneous, they control here. Indeed, even SEACC admits that the original 1973 version of what is now 40 C.F.R. § 122.3(b) unambiguously provided that all discharges of fill

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[10] *See also Fujitsu Ltd.* v. *NETGEAR, Inc.*, 576 F. Supp. 2d 964, 2008 U.S. Dist. LEXIS 28700, *12 (W.D. Wis. 2008) (although absence of preceding comma generally denotes non-restrictive phrase, drafters of patent at issue "did not intend the word 'which' to be non-restrictive"); *Gamesa Eolica, S.A.* v. *General Elec. Co.*, 359 F. Supp. 2d 790, 802 (W.D. Wis. 2005) (same).

[11] In a footnote, SEACC states that the definition of fill material was different when the 1986 statement was made. SEACC Br. 52 n.15. But SEACC does not explain how that fact is relevant. Although the agencies' definition of fill material evolved over the years, they consistently reaffirmed that *all* fill material falls under the Section 404 permit program.

material were exempt from EPA permitting. *See* SEACC Br. 48. This fact renders implausible SEACC's assertion that the agency abruptly shifted course many years later, without any explanation, through grammatical sleight-of-hand.

SEACC simply ignores that the Section 404(b)(1) Guidelines, jointly promulgated by EPA and the Corps, have always provided that discharges of fill material may be permitted without compliance with Section 306 performance standards. The Guidelines "provide a comprehensive means of evaluating whether any discharge of fill material * * * is environmentally acceptable and therefore may be discharged in accordance with the CWA." 67 Fed. Reg. at 31,133. Yet they have *never* required application of Section 306 standards. Although the Guidelines were amended in 1980 (consistent with the statute) to require compliance with toxic effluent limitations promulgated under Section 307, the agencies did not even discuss including Section 306 effluent limitations under that mandate. *See* 45 Fed. Reg. 85,336 *et. seq.* (1980).

Thus, the federal agencies' interpretation that discharges of fill material are not governed by Section 306 standards of performance is fully consistent with the plain language of both the NPDES and Section 404 regulations. That should be the end of the analysis, since SEACC does not dispute that that interpretation passes muster under *Chevron* in the event the statute itself does not answer the question.

2. But even if one looks at the extra-regulatory snippets cobbled together by SEACC, the answer is no different. In none of those statements did either EPA or the Corps state that discharges meeting the

operative definition of fill material would be subject to EPA permitting or Section 306 performance standards. Rather, as explained in the opening briefs and above, they consistently stated the opposite.

The weakness in SEACC's argument is revealed by its critical reliance on the agencies' *deletion* of language from the 2002 fill rule that would have excluded discharges subject to effluent limitations. SEACC Br. 56. An agency's interpretation of its own regulation cannot be overturned by adopting language that was intentionally deleted from the regulation itself. And SEACC ignores the actual reason that language was removed. The agencies excluded the provision partly in response to a comment from the mining industry that the proposed language "could inadvertently result in attempts by regulators in the field to have discharges excluded from section 404 coverage simply due to the presence of constituents in the material for which effluent limitation guidelines exist," including "mine drainage or process waste water." JA45a-46a.

Nor did the agencies state that "mine tailing discharges subject to effluent limitations would remain so." SEACC Br. 56 (citing JA47a-48a). The cited commentary states that "*any* material that has the effect of fill is regulated under section 404" and that the placement of "tailings" is "considered a discharge of fill material." JA48a (emphasis added). The agencies understood that the new fill rule, which eliminated the "waste" exclusion and treats all fill discharges consistently, might slightly increase the number of discharges subject to Section 404. *See* JA43a (stating that rule would not "greatly increase" waste disposal activities regulated by section 404). And although the agencies intended to preserve the

validity of any previous EPA "determin[ation] that certain materials are subject to an [effluent limitation guideline] under specific circumstances," JA48a, no such determination was ever made in the specific circumstances of the Kensington project. In fact, the agencies expressly made the opposite determination. *See* JA141a-149a.

SEACC's reliance on unrelated statements involving the regulation of asbestos is equally wide of the mark. *See* SEACC Br. 50-51. SEACC posits that EPA must have intended to subject discharges of fill material to effluent limitations because it allegedly declined to issue Section 307 guidelines for asbestos contained in mining discharges. This convoluted theory collapses, given that the cited statements nowhere refer to Section 404 or fill material, or even Section 307. Nothing in this unrelated rulemaking even remotely implies that fill material is subject to Section 306 standards of performance, or that asbestos in fill material would be otherwise unregulated. In fact, the flexible process under Section 404 is fully capable of protecting against asbestos contamination, should it ever arise. *See* 67 Fed. Reg. at 31,133 (process "is expressly designed to address the entire range of environmental concerns arising from discharges of dredged or fill material").

Faced with an absence of any agency statements supporting its own position, SEACC resorts to unsupported characterizations. It asserts that "[f]or decades, EPA issued NPDES permits for discharges that met its effect-based definition of 'fill material' but were also subject to effluent limitations." SEACC Br. 49 (citing JA83a-84a). As support, SEACC cites agency commentary on the 2002 fill rule, but one will search the cited pages in vain for

any such statement. That is not surprising, given EPA's contemporaneous statement in the actual regulations that "EPA has never sought to regulate fill material under effluent guidelines." 67 Fed. Reg. at 31,135.

SEACC also asserts that the so-called Regas Memorandum—which entirely rejects SEACC's position—recognizes that discharges with an "incidental" filling effect "would meet the new definition of 'fill material' but would not be eligible for section 404 permits." SEACC Br. 50. But that is false. The agencies made clear that discharges with such incidental effects would *not* meet the fill definition. *See* 67 Fed. Reg. at 31,135 ("[W]e do not consider such pollutants to be 'fill material.'"); JA46a (same); Alaska Br. 53. The Regas memorandum simply reflects that determination. *See* JA145a.[12]

SEACC also disputes whether the Corps previously had a practice of permitting discharges of fill material that also implicated effluent limitations. The Corps' practice is of little import in interpreting its

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[12] That memorandum, issued in 2004 by the heads of all the relevant EPA water regulation offices, embraces the interpretation advanced by petitioners and the Federal respondents in this case. *See* JA141a-149a. SEACC, however, contends that this pronouncement is not entitled to deference under either *Chevron* or *Auer* because it allegedly changed agency policy. SEACC Br. 59-60. As explained above and in Alaska's opening brief, the memorandum merely restated longstanding agency policy reflected in regulations and statements made after notice-and-comment, which unquestionably deserve deference. In any event, the memorandum is itself entitled to deference under this Court's standards. *See* Alaska Br. 42 (quoting *Barnhart* v. *Walton*, 535 U.S. 212, 222 (2002)) (*Chevron* deference); *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2349 (2007) (*Auer* deference).

regulations, since the actual regulations have never required application of EPA effluent limitations. But regardless, in 1984 the Corps issued a Section 404 permit for the Red Dog Mine—which would have been subject to the performance standard for process wastewater relied on by SEACC here—to discharge its tailings into waters of the United States. *See* SER 979; Coeur Br. 40-41. SEACC notes that that permit was to aid construction of a dam for the impoundment, *see* SEACC Br. 53, but that is a distinction without a difference. Under SEACC's theory, no fill permit can ever issue for any discharge of mine tailings from a froth flotation mill into any regulated waters for any purpose. Yet both in this case and 24 years ago at the Red Dog Mine, the Corps permitted a discharge of mine tailings as fill material when those tailings originated at a mine subject to that effluent limitation.

As explained in the opening briefs, while the agencies' definition of "fill material" has evolved over the years, they have been entirely consistent on the central point at issue in this case. If a discharge meets the operative definition of fill material, it has always been permitted by the Corps under Section 404, and has never been subject to permitting by EPA under Section 402 or to the Section 306 effluent limitations applied thereunder. The 2002 fill rule confirmed that interpretation. The agencies decided on a uniform definition of fill material, and determined that "by establishing a program under section 404 for authorizing discharges of fill material into waters of the U.S., Congress sanctioned the filling or elimination of waters where it can be done in an environmentally acceptable manner, i.e., where consistent with the 404(b)(1) Guidelines." JA51a. Under that interpretation, the definition of "fill

material" is a bright-line test that "determines the basic jurisdiction of the section 404 versus the section 402 program." 67 Fed. Reg. at 31,133.

* * *

This case is straightforward. There is no dispute that the proposed discharges are fill material under the applicable definition. The CWA is clear that the Corps may permit this discharge, because it meets the Section 404(b)(1) Guidelines and was not vetoed by EPA. But even if the statute were ambiguous, the expert agencies' interpretation of the statute—which in turn consists of valid interpretations of their own regulations—is reasonable and therefore entitled to dispositive deference under *Chevron*.

CONCLUSION

For the foregoing reasons, and those in Alaska's opening brief, the judgment below should be reversed.

Respectfully submitted,

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